consent order without more ado. There was no order for the giving of possession on the expiry of the lease which is a prerequisite for its enforcement by a writ of possession as required by the rules of court and learned Judicial Commissioner therefore could not and should not have given leave to issue a writ of possession in this case.

We accordingly at the conclusion of argument allowed this appeal with costs here and below, set aside the writ of possession and the leave granted for its issue and ordered the deposit lodged in court by way of security to be paid out to the appellant to account of his cost.

Appeal allowed.

Solicitors: *Azman, Davidson & Co.; Jayadeva & Kamal.*

PARUVATHY D/O MURUGIAH v. KRISHNAN S/O DORAISAMY

[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Seah F.JJ.) February 7, & May 16, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 98 of 1982]

Land Law – Temporary Occupation Licence – Assignment illegal – Whether doctrine of equitable estoppel applies against holder of temporary occupation licence – House on land built by person at the cost of holder of licence – Contracts Act 1950, s.24 – National Land Code, s.68.

In this case the appellant was the holder of a temporary occupation licence of a piece of land in Seremban. The respondent built a house on the land and claimed that he was entitled to do so by virtue of a document made between the appellant and himself and one Thangavelu whereby the appellant gave "equal shares" in the land to the respondent and Thangavelu. The appellant claimed possession of the land and house. The respondent claimed that he had a right to stay on because of the document executed by the appellant and because he had built the house at the request and with the consent of the appellant. The learned Magistrate found that the house was built by the respondent at the request and with the consent of the appellant, but further held that although it was so built the respondent had no equitable estoppel because in her view the principle of equitable estoppel only applied, where the person against whom the principle is involved, is the owner of the land in question. The learned Magistrate however held that the respondent did obtain an interest in the land which came to an end "somewhere five years from the date of the notice." She therefore gave judgment to the appellant and ordered the respondent to deliver vacant possession and pay $160 by way of damages for staying over.

On appeal the learned Judicial Commissioner in the High Court ruled that the principle of equitable estoppel applied and continues so long as the TOL subsists. He therefore reversed the decision of the learned Magistrate.

The appellant appealed.

Held, (1) the principle of equitable estoppel can in a proper case be invoked against the holder of a temporary occupation licence;

(2) in this case however the document purported to be executed by the appellant was void for illegality as it was in contravention of section 68 of the National Land Code, as it purported to transfer the rights and interests of the appellant in the TOL;

(3) on the facts the document was also a fraudulent document and therefore the principle of equitable estoppel could not arise in the respondent's favour;

(4) although the house was built by the respondent it was built with the money of the appellant and therefore its ownership was with the appellant;

(5) no evidence was led by the appellant on the question of damages and in the circumstances the appellant should be given vacant possession of the land and house and token damages of $10.00.

Cases referred to:

(1) *Inwards & Ors.* v. *Baker* [1965] 1 All E.R. 446.
(2) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, 170.
(3) *Plimmer's Case* (1884) 9 App. Cas. 699, 713, 714.
(4) *Hee Cheng* v. *Krishnan* [1955] M.L.J. 103.
(5) *Murugesan* v. *Krishnasamy & Anor.* [1958] M.L.J. 92.
(6) *Chalmers* v. *Pardoe* [1963] 3 All E.R. 552.

FEDERAL COURT.

G. Sri Ram for the appellant.

Joseph Chia for the respondent.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the judgment of the Court): This is an appeal from the decision of the learned Judicial Commissioner, Seremban, which itself arose from the decision of the Seremban Magistrate giving judgment for the appellant/plaintiff. The facts are as follows:

The appellant is the holder of a temporary occupation licence (TOL) in respect of a piece of land held under L.T.S. No. 1544 of Mukim of Rasah, Seremban. The TOL was originally issued to her husband, but after his death, the Seremban Collector of Land Revenue has since September 10, 1974 issued it to her. Two houses were built on the land, one of which was built in 1974

after the death of the appellant's husband. This house is now in occupation by the respondent. The appellant claims that the house was built by her and that she gratuitously allowed the respondent to live in it for two months only commencing October 20, 1974 and that she wanted him to vacate the premises by December, 1974. When he refused to do so, the appellant through her solicitors sent a notice dated February 21, 1976 to the respondent to quit. As the notice was ignored by him she sued the respondent for delivery of vacant possession of the house and for damages for holding over. The respondent on the other hand defended the suit claiming that he has the right to stay on because firstly the house was his which he built at the request and consent of the appellant and secondly because the appellant executed a document (Exhibit D8) in his favour allowing him to live on the land.

The learned Magistrate after hearing the evidence of both sides found that the house in question was built by the respondent at the request and with the consent of the appellant, but further held that although it was so built the respondent had no equitable estoppel against the appellant because the principle of *Inwards & Ors.* v. *Baker*[1] was not applicable. According to the learned Magistrate equitable estoppel only applies when the person, against whom the principle is invoked, is the owner of the land in question. Since the appellant is a mere TOL holder she "has no interest in the land. She is merely a licensee who has occupational or personal right over the land". Yet despite the ruling she introduced *Inwards & Ors.* v. *Baker (supra)* by the back door because she further held that the respondent, however, "did obtain an interest on the construction of the house with the consent and knowledge of the" appellant and that having regard to the nature of the respondent's interest as one that could not be terminated by a short period of notice the interest came to an end "somewhere five years from the date of notice", i.e. on February 21, 1981 (the date of notice being February 21, 1976). She therefore gave judgment to the appellant and ordered the respondent to deliver vacant possession and to pay $160/- by way of damages for staying over.

We must confess here that we found difficulties in following the logic of the learned Magistrate's ruling and we are just as puzzled as was the learned Judicial Commissioner who heard the appeal in the court below as to how the respondent acquired his interest if *Inwards* v. *Baker (supra)* was not applicable and why it was terminated somewhere five years after the date of the notice, i.e. February 21, 1981 or why it was terminated at all. Probably the learned Magistrate must have thought that the right of the respondent might well be derived from the document D8, which she held to be a perfectly valid document and not in contravention of section 68 of the National Land Code.

In the hearing before the learned Judicial Commissioner the latter accepted the finding of fact by the learned Magistrate that the house was built by the respondent at the request and consent of the appellant. He also agreed with her that the document D8 was not an assignment of the TOL and that it was therefore not in contravention of section 68 of the National Land Code. He, however, disagreed with her as to the applicability of *Inwards* v. *Baker (supra)* to this case. He ruled that the equitable estoppel applies and continues as long as the TOL subsists in the appellant's name and as such reversed the order of the learned Magistrate. Hence this matter was back to square one again. The appellant therefore appeals further to this court.

Applicability of equitable estoppel:

Counsel for the appellant prefaced his submission to us by saying that this appeal rested on an issue as to whether the principle of equitable estoppel could be invoked against a TOL holder. He argued that since a TOL holder is not an owner but only a licensee of the land in question the principle cannot arise. With respect, we do not agree with this submission. There is noting in the speech of Lord Kingsdown in *Ramsden* v. *Dyson*[2] or in the judgment of Lord Denning in *Inwards* v. *Baker (supra)* to show that equitable estoppel only arises when the person against whom the principle is to be applied must be "an owner" of the premises in the sense that he has a certain legal estate or interest. Although Lord Kingsdown described such person as "a landlord" and Lord Denning as "the owner", the words were never intended by their Lordships to mean that equitable estoppel only arises when the person against whom the equity is invoked (either described as the landlord or as the owner) must be seized with a certain legal estate in the land such as fee simple or other interest. The words "the owner" and "the landlord" were used by their Lordships in general terms for the purpose of describing the relationship that exists between the person against whom and the other person in whose favour this principle applies.

What interest the former has and what interest in a precise legal term is secured for the latter by that expectation are all irrelevant. The principle is an equitable principle created for the protection of a person who has expended money because of his reliance upon the encouragement by the other. It is because of the expenditure incurred on account of such expectation and encouragement that the parties are brought into a legal relationship. The principle therefore arises in order to govern that relationship irrespective of what interest in the precise legal term each of them has. Lord Denning in fact said this at page 448:

"Counsel for the plaintiffs urged before us that the licensee could not stay indefinitely. The principle only applied, he said, when there was an expectation of some precise legal term; but it seems to me, from *Plimmer's*(3) case, in particular, that the equity arising from the expenditure on land does not fail

> 'merely on the ground that the interest to be secured has not been expressly indicated . . . the court must look at the circumstances in each case to decide in what way the equity can be satisfied.'

So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money."

Thus we do not agree with Mr. Sri Ram's submission that the principle of equitable estoppel does not apply against a TOL holder. This submission is not supported by authorities and the *raison d'etre* for the foundation of the principle, which is for the protection of a person who has expended money pursuant to the request and encouragement by the other. Whether the principle applies or not in this case depends entirely upon whether the respondent relied upon the appellant's request and nothing else, we are of the view that this principle should apply; but if he relied upon something else, we cannot see how this equitable principle could help him.

Document D8 – Assignment or Permission to use TOL land:

We must now turn to document D8. This was introduced by the respondent during the cross-examination of the appellant despite objection by her counsel. D8 was relied upon by him as the basis of his right to build and occupy the house. Counsel for the appellant submitted that the document was an assignment of her TOL and was therefore illegal for contravening section 68 of the National Land Code. Both the learned Magistrate and the Judicial Commissioner were of the view that D8 was not an assignment, but only a permission to use the land, and that it was therefore not void because of illegality. Mr. Sri Ram who appeared for the appellant repeated the submission to us.

To deal with this issue, we reproduce below section 68 of the National Land Code and the Exhibit D8 to see whether there has been a violation or not. This section enacts –

"68. Except in so far as it is otherwise provided, a temporary occupation licence shall not be capable of assignment; and every such licence shall terminate on the death of the person, or dissolution of the body, for the time being entitled to the benefit thereof."

It is obvious from this section that a TOL, being a licence only confers a personal right to the licence holder. This right comes to an end when the holder in the case of a natural person dies or in the case of a company or a firm or other bodies is dissolved. Being a personal right, the legal relationship thereby created is only between the licensor and the licensee. The licence is therefore non-transferable or incapable of assignment at the option of the licensee. It is not a right *in rem* which its holder can deal with as he or it pleases to the detriment of the issuing authority. Thus any assignment or arrangement purporting to transfer or assign the whole or any part of the licensed land will be of no effect and such assignment or arrangement will be illegal under section 24 of the Contracts Act (see *Heng Cheng* v. *Krishnan*(4) and *Murugesan* v. *Krishnasamy & Anor.*(5))

The question we have to ask ourselves here is this: Is exhibit D8 a transfer or an assignment of the appellant's TOL to the respondent and Thagavelu? To deal with this question we set out below exhibit D8, which is as follows:

"I, PARUVATHY d/a MURUGAIAH, holder of Identity Card No. 2478613, L.T.S. No. 1544, Mukim Rasah, District Seremban, am the holder of T.O.L. land held under L.T.S. No. 1544, Mukim of Rasah in the District of Seremban.

I have this day given equal shares in the said piece of land, namely (1) KRISHNAN s/o DORAISAMY, holder of Identity Card No. 78629 and (2) THANGAVELU s/o MURUGIAH, holder of Identity Card No. 785919 both of L.T.S. No. 1544, Mukim Rasah, District of Seremban.

Both the above mentioned person shall use the said piece of land equally with me without any hindrance. All the three of us shall bear and pay all the expenses incurred in respect

of the said land such as assessment, quit rent and other Government Rates, etc., from the date hereof.

The said land shall be levelled and the 'Chukai' money which is as follows be paid by all the three persons as follows:

Levelling of the said land	$560.00
T.O.L. Chukai	82.00
TOTAL AMOUNT	$642.00

The above expenditure amount shall be equally divided and paid by the above mentioned three persons @ $214/- each."

"Signed and delivered by the said PARUVATHY d/o MURUGAIAH at Seremban in the State of Negeri Sembilan this 3rd day of September 1974 in presence of:) Sdg. M. Paruvathy (In Tamil)

Sgd. Govindaraju"
(In Tamil)

In our judgment this document is not merely allowing the respondent and Thangavelu to use the TOL land and to share the costs of its levelling and the licence fee but goes beyond it. It purports to partially transfer whatever right or interest the appellant has in the TOL to both the recipients. The operative words in our view are "I have this day given equal shares" and these must mean what they say and are therefore self-explanatory. A reference to the respondent's own evidence makes the position even clearer. He said that the land belonged to all the three of them and that the purpose of D8 was to clarify matters if there was going to be any dispute later. But the most telling of all is that part of his testimony where he said, "Our intention of preparing D8 is to have the right to stay in the land". (See page 37 of the Record). This explanation clearly shows that the sharing of use and expenses was merely consequential upon and directly flows from the partial assignment. This document is therefore void for illegality as it is in contravention of section 68 of the National Land Code. (*Hee Cheng* v. *Krishnan* (*supra*)).

How D8 was created:

Worse than that is the manner in which D8 came into existence. In form D8 is a unilateral declaration by the appellant to the effect that she gave part of her TOL absolutely to the respondent and one Thangavelu (PW 5). Whilst the appellant signed the document and her signature was witnessed by her younger brother, Govindarajoo s/o Murugiah (PW 4) neither the respondent nor the other receipient, Thangavelu (PW 5), ever signed it. The worse is still to come, when Thangavelu (PW 5) himself testified that he knew nothing of the execution and existence of D8. Thangavelu's evidence was passed over by the counsel for the respondent without a cross-examination or a murmur. It would thus appear that D8 is not an honest document, honestly executed. In so far as the appellant was concerned, she did not know nor did she mean that D8 was for the purpose of giving part of her TOL or even allowing the respondent to stay on the land. According to her, all that she understood of D8 was that it was meant for the levelling of the land whilst according to her brother (PW 4), D8 was meant for the supply of water and electricity to the house. There seems to be no reason why their evidence on the circumstances as to how D8 was brought into existence is not acceptable. Surely such explanation is very reasonable in view of the fact that the appellant and her brother were living in the old house without any water supply and electricity. Yet nothing was discussed or even mentioned by both the learned Magistrate and the Judicial Commissioner. The appellant apparently played only a passive role in bringing D8 into existence. She only signed the document. Although she went to the petition writer with the respondent to have it typed out, all the explanation of the contents of the document to herself and to her brother who afterwards signed it as a witness was done by the respondent and not by the petition writer. Therefore it is obvious that she did not know what D8 was for, except from what the respondent had told her. The respondent on the other hand took a positive step to procure the existence of D8 in order to show that he had as much right as the appellant has to the TOL. Having regard to the appellant's evidence that she did not intend to give the respondent any portion of the TOL land coupled with the respondent's own evidence that D8 was the basis of his legal right to stay on the land, we are of the view that D8 was completely engineered by the respondent. The fact that he did not sign it and the fact that Thangavelu (PW 5), the other recipient, knew nothing about the document or the arrangement contained in it are certainly relevant evidence indicating that D8 is a suspicious document. If D8 is an honest document, Thangavelu (PW 5) would have certainly known it and signed it. In our view this document is purely the creation of the respondent who procured its existence by misleading the appellant and her brother (PW 4) to sign it upon telling them that it was for the levelling of the ground and for the supply of electricity and water to the land. Thus

not only did D8 contravene section 68 of the National Land Code, but it is also a fraudulent document.

Effect of D8:

As the house in question was built upon the basis of D8, which is not only illegal but also fraudulent, we cannot see how the principle of equitable estoppel could arise in the respondent's favour. He who comes to equity must come with clean hands and no equity can arise in his favour in these circumstances. (See *Chalmers* v. *Pardoe*).(6)

Whether respondent relied upon D8 or not:

The next question to consider is whether the respondent relied upon D8 or upon the appellant's request when building the house in question. An examination of the evidence clearly shows that the respondent did not rely upon the appellant's request but upon D8. He created D8 in order to secure his position in case of any dispute arising in the future. In introducing D8 his counsel put a question to the appellant – "I put it to you that the $3,000/– was loan to the respondent so that he be able to build a house on TOL land based on D8 on September 3, 1974?". It is therefore clear from this question that the house was built by the respondent because of the document D8, which he took to be an authority, without which he would not have built the house. He confirmed this by his own evidence to the effect that D8 was signed before the appellant lent him $3,000/– to build the house and that the intention behind D8 was to show that he had a right to stay on the land and so to clarify matters in case there is a future dispute, as he said, "the land belongs to three of us", (meaning the plaintiff, Thangavelu and him). But he did not know, and his counsel too did not know (otherwise he would not have made use of D8) that D8, rather than helping him, is in fact against him; the plaintiff's position being protected by section 68 of the National Land Code.

Thus in his submission to the learned Magistrate his counsel resiled from the position he had taken previously when introducing D8 during the trial. Realising that D8 could no longer be a weapon of offence for the respondent because of illegality and suspected fraud he changed his stand by reducing it to be a mere matter of evidence of an arrangement between the parties to the effect that in consideration of the appellant allowing the respondent to build the house, the latter agreed to share the costs of levelling the land and the TOL fees. We found it difficult to follow the logic of this submission because the levelling of the land was for no other purpose than for the building of the house in question which the respondent said is his. Thus it is the respondent who should bear the whole costs of levelling the land. We do not understand why the appellant should agree to contribute towards the costs when she received practically no benefit at all and, on the contrary, continued to live in the old house which was leaking and unfit for human occupation. This is a clear case that D8 was not of her making, but a fraud upon herself.

Counsel for the respondent is obviously vexed by the problem of illegality raised by D8. He directed our attention to *Murugesan* v. *Krishnasamy & Anor (supra)* in the expectation that we should sever this illegality from the rest of the case. We have given very serious consideration to this problem, but we regret that we are unable to do so, because according to the evidence the respondent in fact relied upon D8 to be the legal basis of his stay on the appellant's TOL land and it is upon this document, and upon this document alone, that he built the house. Although he also said in his evidence that the appellant requested him to build the house, he did not in fact rely upon such request. He relied upon that illegal document. It is therefore clear that the principle of equitable estoppel could not arise under these circumstances. *(Chalmers* v. *Pardoe) (supra).* This means that the respondent could claim no right under D8 nor under the principle of *Inwards* v. *Baker (supra)* and that the appellant is therefore entitled to the possession of the land and to the damage for staying over after the notice to quit was given.

Question of Compensation:

Is the respondent entitled to any compensation? Mr. Sri Ram submitted that we should send the case down to Senior Assistant Registrar to have the house in question valued under section 28(2) of the Civil Law Act, 1956. With respect we disagree with the submission because section 28(2) is applicable only if the house was built by the respondent in the *bona fide* belief that he had an estate in fee simple or other absolute estate, which the section speaks about.

In our view whether the respondent is entitled to the compensation or not depends upon whether or not he is the owner of the house. If he is, common sense will tell us that he is entitled to some

compensation, but if he is not he has to give up the house and leave without any compensation at all.

The issue as to who is the owner of the house in question was not decided by the learned Magistrate. It seemed to have escaped her attention as well as that of the learned Judicial Commissioner in the courts below. The only reference in the judgment of the learned Magistrate relating to the house is as follows:

"Nonetheless, after hearing the two conflicting versions as to *who built the house in question*, the court preferred the version given by the defendant since it is more reasonable and probable that at the time when the relationship was good the plaintiff could have told the defendant to build a house on her land and to remain there. . . ."
(page 45 of Record – emphasis is ours)

It is clear from the above passage that the learned Magistrate was only making a finding as to who built the house. In so far as that finding goes, it is unassailable because the appellant also said so. The learned Judicial Commissioner was therefore right in not interfering with the finding. But it does not necessarily follow that the respondent is the owner of it. As a finding as to its ownership is important and as no such finding was made by the courts below, we are entitled to look at the evidence and make the necessary finding ourselves on the basis of this evidence.

In our view, he who spends the money to get the house built should be its owner. The plaintiff said that she spent $7,000.00 to build the house inclusive of fencing and other works. She said she gave $5,000.00 to the respondent for the purpose of building a house for her. $3,000.00 came from her bank account which she opened with her husband's Employee's Provident Fund money, and $2,000.00 came from a loan she took from her brother-in-law, Krishnan s/o Kandasamy (PW 2). She gave no evidence, however, as to the source of the other $2,000.00. Because of this expenditure, the appellant therefore claimed the house to be hers. The respondent admitted receiving the $3,000.00 withdrawn from the appellant's bank account but claimed that the sum was a loan to him for him to build a house of his own and that he had fully paid it up. He denied receiving any other sum from the appellant. He said that the cost of the house was $10,300.00, of which $3,000.00 came from the appellant's loan to him and the remaining $7,300.000 came from his own saving. He said that the $3,000.00 loan was fully repaid to the appellant on October 31, 1974. To lend credibility to his loan story he created a rather ludicrous episode about his wedding dinner in which he collected cash gifts from guests who attended the dinner. He claimed to have spent $860.00 for the wedding dinner and collected more than $3,000.00 from his guests and so he repaid the appellant's loan.

It is interesting to note that at the time of his marriage he was only 24 years old and earned $160.00 a month as a school gardener. The guests who attended the dinner numbered about 100 persons, most of whom were Chinese. There were 5 Indians, 2 Malay teachers, 5 Sikhs, 10 Germans from a fashion house and also some Japanese guests. A simple arithmetical calculation will show that he could not have collected $3,000.00 from such a small gathering of guests. To collect that sum it means that each guest was paying $30.00. Considering the respondent's station in life, there is a touch of ludicrousness when he insisted that the Germans and the Japanese even came to his wedding dinner. We cannot see how this testimony could be held to be more reasonable and probable than the appellant's version that $3,000.00 was not a loan. It is neither reasonable nor probable that the respondent could have collected $3,000.00 from such a dinner. To us this is an insult to human intelligence. Even for his wedding expenses the appellant had borrowed $2,000.00 for him from her friend Janaki d/o Kalia Perumal (PW 2). Out of this loan he only repaid her $700.00 and the remaining sum remains unpaid.

The respondent next claimed that the total cost of the house was $10,300.00, of which $7,300.00 came from his saving. We are at a loss to understanding how he could have that much saving, when he was only a gardener earning $160.00 a month and he was only working for three years then. When pressed for further explanation he came out with yet another bizarre story that he had been saving since 1962. Yet in 1962 he was only 12 years old. The respondent's ingenuity to reply to questions knows no limit, because when further questioned he went on to say that the savings came from his $200.00 a month earning as a factory worker since 1962. Yet he gave no explanation as to why he left that higher paid job for the lower paid job of $160.00 a month as a gardener. We are really at a loss to understand how the learned Magistrate accepted this evidence as being more reasonable and probable when it is so patently false and unbelievable, even under cold prints.

To us although the house was built by the respondent, its ownership is not with him. It is with the appellant because this was built with her money. Although the appellant did not appeal against the finding of fact, we are, however, justified in making our own finding on the issue because no finding was made on it by the courts below.

Before we conclude this judgment, there is, however, one other matter to be considered. The learned Magistrate in the court below awarded $160.00 as damages against the respondent for holding over of the premises. But the calculation was based on her erroneous finding that the respondent had an interest in the construction of the house and that this interest expired some five years after the date of the notice to quit, i.e. on February 21, 1981 (the date of the notice to quit being February 21, 1976). In other words, the $160.00 damages were awarded because the respondent was holding on the premises for seven months commencing from the date of expiry of his interest, which was on February 21, 1981 to the date of the judgment of the learned Magistrate, which was on September 23, 1981. In our view this award cannot stand. The damages to be awarded, if at all, should be calculated with effect from the date when the respondent, not being the owner of the house, was required by the appellant to give up possession of the house as asked for in her statement of claim. But there is no evidence led by her at all on the question of damages, as the case was fought in the courts below on the basis of the question as to whether it was the appellant or the respondent who built the house. Thus, if substantial damages have to be awarded, the case must be sent back to the learned Magistrate for her to hear evidence and assess damages accordingly. In our view this course of action is impracticable because of the time lag and the possibility that the Magistrate who heard the case is no longer available. On the other hand since as a matter of law the appellant is entitled to damages for holding over, we feel that a token damage of $10.00 will not be out of place.

Hence, our judgment is that the appellant is entitled to obtain vacant possession of the land and the house, a token damage of $10.00 and that the appeal is therefore allowed with costs both here and in the courts below and that the deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Chan & Chia.*

TARA RAJARATNAM v. DATUK JAGINDAR SINGH & ORS.

[O.C.J. (Abdul Razak J.) July 17, 1982]
[Johore Bahru – Civil Suit No. 284 of 1979]

Contract – Agreement by plaintiff to transfer land as security for advance of money – Memorandum of transfer executed – Undertaking by defendant not to sell land to anyone else for one year – Defendants advocates and solicitors acting for plaintiff – Undue influence – Action for breach of contract, breach of trust and fraud – Principal and agent – Collusion – Contracts Act, 1950. 16(1) & (2), 17, 20 – Evidence Act, 1950, s. 10 – National Land Code, s. 340.

Legal Profession – Solicitors committing grave and abominable acts of contempt against court – Deceiving the court – Punishment – R.H.C. 1980, 0.52 r.1.

In this case the plaintiff had agreed to transfer her land as security for an advance of $220,000 to the plaintiff or her account. The money was to be used to pay off a charge on the land and also to pay the first defendant an amount payable by the brother-in-law of the plaintiff for whom the first defendant had stood surety in getting an advance from a bank. The first and second defendants were advocates and solicitors and acted for the plaintiff in preparing the necessary documents. The land was transferred to the 2nd defendant by a memorandum of transfer but there was an agreement adding that the land was not to be sold to any other person without the consent of the plaintiff and the 2nd defendant undertook to transfer the land to the plaintiff in the event of her paying the sum of $220,000. The defendant assured the plaintiff that although the transaction was in the form of a sale, the land would always remain a security. He also assured her that although the period of repayment was limited to one year, the property would be transferred to her nevertheless even after it. It was alleged that the 2nd defendant had instead and in complete disregard of the memorandum and its addition and in collusion with the 1st defendant unlawfully and inequitably transferred the land to him and later the 2nd defendant in order to defeat the plaintiff's title in collusion with the 3rd defendant, also an advocate and solicitor, unlawfully and inequitably transferred the land to the 3rd defendant. The 3rd defendant brought an action for possession of the land against the plaintiff and obtain an order for possession. The plaintiff appealed against the decision but being out of time her appeal was dismissed. She then filed caveats against the land but on an application by the 3rd defendant the caveats were set aside (See [1979] 1 MLJ 173.) The plaintiff then brought the action against the defendants for breach of contract, with undue influence, for breach of trust and for fraud.

Held: (1) in this case there was privity of contract between the plaintiff and the 2nd defendant. On the facts the 2nd defendant in fact bought the land on behalf of the 1st defendant. The 1st defendant was the undisclosed principal and the 2nd defendant was his agent and therefore the 1st and 2nd defendants were liable on the contract;

(2) in this case the 1st and 2nd defendants had acted as solicitors for the plaintiff and the burden of proving that the contract was not induced by undue influence was on them as they were in a position to dominate the will of the plaintiff. The defendants had not discharged that bur-